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Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing with American Employment Law Good Faith and Fair Dealing in the Individual Employment Relationship

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RELUCTANCE AND REMORSE: THE COVENANT OF GOOD FAITH AND FAIR DEALING IN AMERICAN EMPLOYMENT LAW

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I. INTRODUCTION

The covenant of good faith and fair dealing ("the covenant" or "Good Faith") is now an accepted feature of contractual relations in the United States. Essentially undeveloped until the 1960s,[1] the obligation to act in good faith during contract performance and enforcement gained traction once it was written into the Uniform Commercial Code (UCC) and adopted by state legislatures.[2] The covenant achieved broader recognition when included in 1981 as a new section in the Restatement (Second) of Contracts ("Restatement").[3]

In the employment setting, however, the covenant has not fared nearly so well. The majority of states have declined to apply Good Faith at all

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1. *See* E. Allan Farnsworth, *Good Faith in Contract Performance*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 153, 154-55 (Jack E. Beatson & Daniel Friedman eds., 1995); Robert S. Summers, *The Conceptualization of Good Faith in American Contract Law: A General Account*, *in* GOOD FAITH IN EUROPEAN CONTRACT LAW 118, 119 (Reinhard Zimmerman & Simon Whittaker eds., 2000). *See generally* Matthew W. Finkin et. al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMPL. POL'Y J. 93, 135–36 (2009).

2. Section 1–203 of the UCC provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The UCC covers commercial arrangements such as letters of credit, security agreements, and contracts for the sale of goods. The Code's general definition of good faith is "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19) (2004). With respect to the sale of goods, the Code further specifies that for merchants, good faith encompasses not only honesty in fact but also "the observance of *reasonable standards of fair dealing in the trade*." *Id.* § 2-103(1)(j) (emphasis added).

3. Section 205 of the Restatement (2d) of Contracts provides: "*Every contract* imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (emphasis added) The Restatement is an effort to set forth the leading rules and principles in a major field or sector of American law such as contracts, torts, agency, or trusts. Restatements are a product of the American Law Institute, a private organization comprised of scholars, practitioners, and judges.

when reviewing disputes between employers and individual employees.[4] Moreover, although state courts have embraced an assortment of other contract-based or tort-based theories as departures from the basic American rule of employment-at-will,[5] a mere handful of jurisdictions have accepted the covenant in at-will settings.[6] Such judicial reluctance contrasts notably with the position of labor arbitrators, who regularly incorporate the covenant when construing the disputed terms of collective bargaining agreements.[7] Even among states that have applied Good Faith to individual employment disputes, several have circumscribed the covenant's impact in what amount to expressions of judicial remorse.[8]

This article examines the limited reach of the covenant in American employment law. Section II begins with a brief overview of how Good Faith has operated in the general contract setting. It then relies on judicial examples to discuss in detail how the covenant is defined and applied in the employment context by states that recognize its validity, as well as why so many states resist its application. Section II also describes a diminished commitment to Good Faith following the set of initial decisions that applied the doctrine to employment contracts. Finally, Section II discusses cases alleging employer deceit or misrepresentation at the hiring stage. State courts are considerably more likely to enforce norms of good faith and fair treatment during this contract-formation period than they have been to impose the covenant as an implied condition of contract performance.

Section III maintains that the courts' reserved stance toward Good Faith is grounded in the robust persistence of the employment-at-will doctrine. The concept of employment-at-will emerged in the United States as a complement to laissez-faire capitalism. During the nineteenth century, an increase in nonagricultural work and transient employment relationships was accompanied by a shift away from master-servant legal norms toward more open-textured contractual relations.[9] By the late 1800s, at-will had replaced the traditional presumption—that hirings for an indefinite term

4. *See* CLYDE W. SUMMERS, KENNETH G. DAU-SCHMIDT & ALAN HYDE, LEGAL RIGHTS AND INTERESTS IN THE WORKPLACE: STATUTORY SUPPLEMENT AND MATERIALS 193–200 (2007) (reporting that twenty-nine of fifty states have declined to adopt the covenant in employment context).

5. *See* Section II.B. *infra* (identifying growth of exceptions to at-will doctrine).

6. *See* SUMMERS, DAU-SCHMIDT, & HYDE, *supra* note 4 (reporting that nine or perhaps ten states accept covenant in employment-at-will settings).

7. *See* Section IV, *infra* (discussing arbitrator decisions applying the covenant). *See generally* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 478–80 (6th ed. 2003).

8. *See* Section II.D.3. *infra* (discussing court decisions that covenant applies only in areas separately identified as implicating public policy, and that violation of covenant is a breach of contract but not a tort).

9. *See generally* CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 232–92 (1993); Peter Karsten, *"Bottomed on Justice": A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630–1880*, 34 AM. J. LEGAL HIST. 213, 221–24, 229, 232–35, 240–44, 250–51 (1990).

were meant to last a full year—with the individualist conception that indefinite hirings are terminable at the discretion of either party.[10] The enduring common law presumption that employment contracts involve parties with equal information and bargaining power contrasts markedly with the recognition in other legal systems that the employment relationship is essentially one of subordination.[11]

Section III observes that Congress and the Supreme Court have imposed significant federal regulatory limits on the reach of employment-at-will by prohibiting firings based on a range of specific employer motivations.[12] Still, neither Congress nor forty-nine of the fifty states require that decisions to terminate individual employees be justified based on good cause or any comparable grounds. Absent affirmative statutory protection for job security, employment-at-will remains the pervasive default rule. Moreover, this default rule continues to exert a subtle yet significant constraining influence on the development of major federal statutes regulating the workplace.[13] It is not surprising that state courts are reluctant to impose norms of fairness on job security arrangements when employers' residual authority to act in summary, arbitrary, or malicious fashion toward their employees remains legislatively undisturbed.

10. *See generally* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119, 125–27 (1976); Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438–40 (1975).

11. *See* Alan L. Bogg, *Good Faith in the Contract of Employment: A Case of the English Reserve?*, 32 COMP. LAB. L. & POL'Y J. 729, 746–50 (2011) (linking crafting of contractual good faith to emergent strands of sociological realism among common law judges, including appreciation for employees' vulnerability as collective bargaining regime effectively disappeared); Kevin Banks, *Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith in Canadian Common Law*, 32 COMP. LAB. L. & POL'Y J. 547, 556–57 (2011); Bernd Waas, *Good Faith in the Law of the Employment Relationship: Germany*, 32 COMP. LAB. L. & POL'Y J. 603, 624–28 (2011) (discussing examples of dismissals that violate good faith because employer lacked sensitivity to or sufficient concern for the personal circumstances and interests of affected individual workers); Christophe Vigneau, *The Obligation of Good Faith in France*, 32 COMP. LAB. L. & POL'Y J. 593, 600–02 (2011) (addressing restrictions on employer's power of direction over his employees).

12. *See* Section III.A. *infra* (referring *inter alia* to National Labor Relations Act (1935), Equal Pay Act (1963), Title VII of Civil Rights Act (1964), Occupational Safety and Health Act (1970), and Americans With Disabilities Act (1990)), *see also* Perry v. Sinderman, 408 U.S. 593, 601–02 (1972) (holding that public employee has protected property interest in his job, and is entitled to due process before being deprived of that interest); Goetz v. Windsor Central Sch. Dist., 698 F.2d 606, 610 (2d Cir. 1983) (holding that public employee has liberty interest that requires a name-clearing hearing if employer creates and disseminates false and defamatory impression in relation to his discharge).

13. *See* Section III.B. *infra* (discussing at-will's effect on NLRA, Title VII, and WARN).

II. THE LIMITED REACH OF THE COVENANT IN THE EMPLOYMENT SETTING

A. Good Faith Under General Contract Law

Good Faith as an implied contractual term has been recognized by most American jurisdictions for at least the past several decades.[14] Both the UCC and the Restatement predicate this good-faith duty on the underlying presence of a contract: parties are obligated during contract execution and performance, not for the period of contract formation.[15]

The covenant is subject to certain limits even during the contract performance period. Some courts have held that Good Faith only applies in relation to the express provisions of a contract and the parties' reasonable expectations flowing from those provisions.[16] Accordingly, the doctrine does not create an additional, independent obligation to act fairly or reasonably that can be separately breached.[17] Further, many courts have held that because the implied duty does not supersede express provisions of an agreement, parties can in effect contract around Good Faith with respect to particular terms.[18]

The scope of the covenant encompasses both negative and affirmative obligations. UCC definitions refer to "honesty in fact" and also to "the observance of reasonable standards of fair dealing in the trade."[19] The concept of honesty and fair dealing readily covers undesirable conduct such as subterfuge or evasion to escape contractual promises,[20] or opportunistic efforts "to take advantage of one's contracting partner in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties."[21] In addition, courts have held that

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14. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 404 (1980) (listing cases). *See generally* U.C.C., §§ 1-203, 1-201(19), 2-103(1)(b); RESTATEMENT (2d) OF CONTRACTS § 205 (discussed *supra* notes 2 and 3); 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.17, at 355–56 (3d ed. 2004); Carmichael v. Adirondack Bottled Gas Corp., 635 A.2d 1211, 1216–17 (Vt. 1993); Anthony's Pier Four v. HBC Assocs., 583 N.E. 2d 806, 820–21 (Mass. 1991).

15. *See* FARNSWORTH, *supra* note 14, at 357; Travelers Indem. Co. v. CDL Hotels USA, 322 F.Supp.2d 482, 493 (S.D.N.Y. 2004); Potlatch Corp. v. Beloit Corp., 979 P.2d 114, 117 (Idaho 1999).

16. *See* FARNSWORTH, *supra* note 14, at 358; McAdams v. Mass. Mut. Life Ins. Co., 391 F.3d 287, 300–01 (1st Cir. 2004); Duquesne Light Co. v. Westinghouse Elec. Co., 66 F.3d 604, 617 (3d Cir. 1995); Uno Rest. v. Boston Kenmore Realty Corp., 805 N.E. 2d 957, 964 (Mass. 2004).

17. *See McAdams*, 391 F.3d 300; E. ALLEN FARNSWORTH, CONTRACTS: CASES AND MATERIALS 529 (7th ed. 2008) (quoting U.C.C. Editorial Board's 1994 Commentary on U.C.C. § 1-203, which was subsequently re-numbered § 1-304).

18. *See* FARNSWORTH, *supra* note 14, at 359; Kham & Nate's Shoes v. First Bank, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.); Adams v. G.J. Creel & Sons, 465 S.E. 2d 84, 85 (S.C. 1995).

19. U.C.C., §§ 1-201(19); 2-103(1)(b).

20. *See* Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 363 (7th Cir. 1990) (Posner, J.); FARNSWORTH, *supra* note 14, at 361.

21. Indus. Representatives v. CP Clare Corp., 74 F.3d 128, 130 (7th Cir. 1996) (Easterbrook, J.) (internal citations omitted).

Good Faith may impose affirmative obligations on promisees to cooperate in or provide reasonable support for their promisors' performance.[22] For instance, when one contracting party has discretionary authority to determine quantity, price, or time for completion, that party may be required to exercise its discretion in a reasonable and fair manner.[23] Courts also have held that an insurance company may have a good faith obligation to settle in an appropriate case,[24] and that one party may be obliged to disclose material information that was overlooked by the other party and is not reasonably discoverable.[25]

Good Faith is frequently invoked in breach of contract claims involving franchise agreements.[26] There are certain parallels between franchisees and employees, in that both are economically dependent on their contractual partners and both are viewed as having arm's length rather than fiduciary relationships with these partners.[27] Courts may rely on the covenant to hold that a franchisor's establishment of a competing outlet violates Good Faith even though no express contract term provides for an exclusive territory.[28] Of perhaps more direct relevance, courts have often held that franchise agreements lacking specific durational provisions may not be terminated without reasonable notice, allowing the franchisee sufficient time to obtain a substitute arrangement, recoup its investment, or minimize losses.[29]

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22. *See* Blackstone Consulting Corp. v. United States, 65 Fed. Cl. 463, 471 (2005); Kehm Corp. v. United States, 93 F.Supp. 620, 623 (Ct. Cl. 1950); Larson v. Larson, 636 N.E.2d 1365, 1368 (Mass. App. 1994); FARNSWORTH, *supra* note 14, at 362–63.

23. *See* Empire Gas Corp. v. American Bakeries Co. 840 F.2d 1333, 1339 (7th Cir. 1988) (Posner, J.); Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1127–28 (N.J. 2001); Peak-Las Positas Partners v. Bollag, 90 Cal. Rptr. 3d 775, 781 (Cal. Ct. App. 2009); FARNSWORTH, *supra* note 14, at 365–67 (discussing output and requirement contracts).

24. *See, e.g.*, PPG Indus. Inc. v. Transamerica Ins. Co., 975 P.2d 652, 655 (Cal. 1999); Communale v. Traders & General Ins. Co., 328 P.2d 198, 200–01 (Cal. 1958).

25. *See* Mkt. St. Assocs. Ltd. Partnership v. Frey 941 F.2d 588, 594–95 (7th Cir. 1991) (Posner, J.).

26. *See generally* Kathryn Lea Harman, *The Good Faith Gamble in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?*, 28 CUMB. L. REV. 473 (1998).

27. *See, e.g.*, Crim Truck & Tractor Co. v. Navistar Transp. Corp. 823 S.W.2d 591, 594–96 (Tex. 1992) (rejecting imposition of general fiduciary duties on the franchise relationship); Amoco Oil Co. v. Cardinal Oil Co., 535 F.Supp. 661, 666 (E.D. Wisc. 1982) (holding that obligation of good faith under Wisconsin contract law does not make franchisor-franchisee relationship a fiduciary one). By contrast, insurance contracts are more often deemed analogous to fiduciary relationships. *See, e.g.*, Vu v. Prudential Property & Casualty Ins. Co., 33 P.3d 487, 491–92 (Cal. 2001); Sobotor v. Prudential Property & Casualty Ins. Co., 491 A.2d 737, 740–41 (N.J. Super. Ct. App. Div. 1984).

28. *See, e.g.*, Vylene Enter. v. Naugles Inc. 90 F.3d 1472, 1477 (9th Cir. 1996); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 727–28 (7th Cir. 1979); Transport Truck & Trailer Co. Inc. v. Freightliner LLC, No. CV-06-282-S-BLW, 2007 WL 294280 at *4-*5 (D. Idaho 2007); Scheck v. Burger King Corp. 798 F.Supp. 692, 694; (S.D. Fla. 1992). *But cf.* Burger King Corp. v. Weaver, 169 F.3d 1310, 1315–18 (11th Cir. 1999) (rejecting reasoning of *Scheck* and concluding that covenant does not apply under Florida law absent breach of an express provision in franchise agreement).

29. *See* FARNSWORTH, *supra* note 14, at 370–76. *See, e.g.*, Maytronics Ltd. v. Aqua Vac Systems, Inc., 277 F.3d 1317, 1320–21 (11th Cir. 2002) (reasonable notice of six months required); Sofa Gallery

To be sure, franchisees often must make substantial investments to initiate or maintain their operations, and applying Good Faith to help protect those investments may prevent irreparable injury and encourage business growth.[30] At the same time, employees, especially those with longer tenure, also make substantial investments, often developing firm-specific experience and expertise as well as spousal or family ties to the local community that make it difficult to find a suitable substitute arrangement or to minimize losses in wages and benefits.[31] As a general matter, employees have less business sophistication and fewer resources than individuals who operate a franchise. Despite these relative disadvantages, employees—as explained below—are less likely than franchisees to enjoy the protections of the covenant.

B. Good Faith Contrasted With Other Exceptions to At-Will Employment

Although employment-at-will has been firmly in place for well over a century, state judges in recent decades have become more cognizant of the doctrine's harsh consequences. Since the early 1970s, courts have developed a wide range of exceptions or limitations to employment-at-will.[32] The ubiquitous tort-based illustration is the public policy exception: employers may not terminate employees for exercising a lawful right or privilege, or for refusing to perform or participate in an unlawful activity.[33] The most comprehensive contract-based example is the employee handbook limitation: when employers promulgate personnel manuals or similarly regularized written practices, such express provisions may establish reasonable contractual expectations or entitlements for their employees.[34] State courts have invoked additional common law doctrines to protect terminated employees, albeit on a less widespread basis. These exceptions

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Inc. v. Stratford Co., 872 F.2d 259, 263 (8th Cir. 1989) (reasonable notice of unspecified length required); Monarch Beverage Co. v. Tyfield Importers, Inc., 823 F.2d 1187, 1190 (7th Cir. 1987) (reasonable notice of thirty days required); Jen-Rath Co., Inc. v. Kit Mfg. Co. 48 P.3d 659, 663–65 (Idaho 2002) ($255,000 damages for lack of reasonable notice. *See also* Lumber Enter. Inc. v. Hansen, 846 P.2d 1046, 1050 (Mont. 1993) (reasonable notice of thirty days required by state statute).

30. *See, e.g.*, Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (1st Cir. 1970); LaGuardia Assocs. v. Holiday Hospitality Franchising, Inc., 92 F.Supp. 2d 119, 131 (E.D.N.Y. 2000).

31. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 24–25 (1993).

32. *See generally* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEBR. L. REV. 7, 12–14 (1988).

33. *See, e.g.*, Gantt v. Sentry Insurance, 824 P.2d 680 (Cal. 1992); Gardner v. Loomis Armored, Inc., 913 P.2d 377 (Wash. 1996). *See generally* SUMMERS, DAU-SCHMIT & HYDE, *supra* note 4, at 179–92 (reporting all fifty states have adopted some version of public policy exception).

34. *See, e.g.*, Wooley v. Hoffman-LaRoche, 491 A.2d 1257 (N.J. 1985); McIlravy v. Kerr-McGee, 119 F.3d 876 (10th Cir. 1997) (applying Wyoming law). *See generally* SUMMERS, DAU-SCHMIT & HYDE, *supra* note 4, at 193–200 (reporting forty-one states have held that handbooks or personnel manuals may give rise to contractual entitlements).

include the tort doctrines of intentional infliction of emotional distress and defamation[35] as well as implied-in-fact oral contracts and promissory estoppel on the contract side.[36]

In the employment setting, the covenant is something of a hybrid between contract and tort. The covenant is presumed to be incorporated as part of the contractual arrangement between employer and employee. Yet in contrast to contract law erosions of employment-at-will that are related to the intentions of the parties, Good Faith is implied as a matter of law. Its justification stems not from the idea that two particular contracting parties intended to be fair with one another, but from the idea that society imposes a norm of fair conduct as a condition of any agreement between them. In this regard, the covenant's expansive terms of "good faith" and "fair dealing" resemble the comparably open-ended language of the tort-based public policy exception.

Unlike the public policy exception, however, the covenant has never achieved widespread endorsement. In order to understand why a handful of states accept the covenant and why far more refuse to do so, it is useful to consider prominent case law illustrations from each group.

C. *Applying and Justifying the Covenant: Minority Rule*

States adopting the covenant have articulated a number of distinct conceptual approaches. Because courts usually define or explain the covenant while reviewing employee terminations that may constitute a breach, they have tended to focus on what type of employer conduct qualifies as a *lack of* good faith.

1. Employee Access to Benefits of the Bargain

The prevalent approach involves protecting the benefit of the employee's bargain against opportunistic employer behavior related to the employee's past service. In *Metcalf v. Intermountain Gas Co.*,[37] Metcalf worked as a clerk and she accrued sick time pursuant to company policy. In the course of undergoing two operations, she used eight weeks of her accrued leave over a two-year period. Metcalf was then reduced to being a

35. *See* Lewis v. Equitable Life Assurance, 389 N.W. 2d 876 (Minn. 1986) (defamation); Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991) (applying Texas law) (intentional infliction of emotional distress).

36. *See* Grouse v. Group Health Plan Inc., 306 N.W.2d 114 (Minn. 1981) (promissory estoppel); Pugh v. See's Candies, 171 Cal. Rptr. 917 (Cal. App. 1981) (oral contract implied in fact).

37. 778 P.2d 744 (Idaho 1989).

part-time employee "in part allegedly because of her sick leave status";[38] she subsequently resigned.

In reversing a grant of summary judgment entered against Metcalf, the Idaho Supreme Court announced its adoption of the covenant for employment contracts. The court explained that the covenant "protects the parties' benefits in their employment contract or relationship, and . . . any action which violates, nullifies, or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant."[39] In this instance, the employer may well have violated the covenant by offering Metcalf the opportunity to earn and use sick leave benefits and then penalizing her for depending on those same benefits.[40]

The Idaho Supreme Court eschewed any reliance on the "amorphous concept of bad faith,"[41] noting that it did not want to get in the business of distinguishing a "bad faith" discharge from a no-cause discharge that is clearly permitted under at-will doctrine.[42] Assuming that Metcalf's departure amounted to a constructive termination, the court's justification was narrower. Once Metcalf bargained for sick leave benefits as part of her employment arrangements, her employer's retaliatory reduction in her working status unlawfully undermined her access to or enjoyment of those earned benefits.

The Arizona Supreme Court set forth a similar rationale in *Wagenseller v. Scottsdale Memorial Hospital*.[43] Nurse Wagenseller was terminated several months after a rafting and camping trip with her supervisor and other hospital personnel, during which she refused to take part in many group activities she regarded as unsavory.[44] Wagenseller had very high job performance evaluations before the rafting trip; she maintained that her refusal to participate in the off-color group conduct led to deteriorating relationships with management, ending in her termination.[45]

The Arizona court rejected Wagenseller's argument that termination without good cause is a violation of the covenant. At the same time, the court recognized the existence of the covenant in at-will employment contracts as *"protect[ing] an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the*

38. *Id.* at 746.
39. *Id.* at 749.
40. *See id.* at 753 (concurring opinion).
41. *Id.* at 749.
42. *See id.*
43. 710 P.2d 1025 (Ariz 1995).
44. *See id.* at 1029. The activities included "public urination, defecation, and bathing, heavy drinking, and 'grouping up' with other rafters."
45. *See id.*

employee."[46] Even in an at-will setting, there may be numerous terms agreed to between the parties, such as "that the employer will provide the necessary working conditions [for performing the required work] and pay the employee for work done."[47] The court added, however, that an assurance of continued employment or tenure can never be one of the terms agreed to as part of at-will employment; because Wagenseller was claiming a breach of her right to continued employment, her claim under the covenant must fail.[48]

Perhaps the most recognized instance of employers terminating their employees to recapture or avoid payment of specified benefits involves commission-based compensation arrangements. In the leading case of *Fortune v. National Cash Register Co.*,[49] an experienced salesman's written contract specified both his at-will status and his right to a weekly salary plus a bonus for equipment sales made within the territory assigned to him. Fortune helped secure a five million dollar purchase order from an established customer that called for delivery of cash register machines over a four-year period. He was given a termination notice dated the first working day following the consummation of the purchase, but then was asked to stay on in a reduced "sales support" capacity to coordinate the delivery process. Eventually he received three-fourths of his bonus; after his termination he sued to recover the remaining one-fourth.[50]

In reinstating a $45,000 jury verdict, the Massachusetts Supreme Court identified the central issue on appeal as whether the employer's "bad faith" termination amounted to a breach of the at-will employment contract.[51] Under the express terms of his contract, Fortune had received the full bonus commissions to which he was entitled.[52] Moreover, the employer had not simply pocketed the remaining 25%, but had given it to another employee who assisted with the installation process.[53] Nonetheless, the Massachusetts court determined that the written employment contract contained an implied covenant of good faith and fair dealing, and that Fortune was entitled to a jury determination as to whether that covenant

46. *Id.* at 1040 (emphasis added).

47. *Id.*

48. *See id.* at 1040–41. Wagenseller did survive summary judgment under the public policy exception, as she allegedly was fired for refusing to participate in conduct arguably violative of Arizona's indecent exposure statute. *See id.* at 1035–36, 1044.

49. 364 N.E.2d 1251 (Mass 1976).

50. *See id.* at 1253–54 (describing facts).

51. *Id.* at 1255.

52. The contract called for Fortune to be paid 75% of the applicable bonus credit if the territory was assigned to him on the date of the purchase order and 25% if the territory was assigned to him on the date of final delivery and installation. *See id.* at 1253.

53. *See id.* at 1254. This payment to a systems-and-installation employee, however, was contrary to the company's normal policy of paying bonuses only to salesmen. *Id.*

was breached given the circumstances of his firing. In particular, a jury reasonably could have found that Fortune was stripped of his "salesman" designation and subsequently fired in order to disqualify him for the remaining 25% of the commissions due on delivery of the cash registers.[54]

The *Fortune* decision goes beyond *Metcalf* and *Wagenseller* in applying the covenant to contract benefits an employee was on the brink of earning, as opposed to benefits he already had earned.[55] Moreover, the fact the employer gave the commission to another employee rather than keeping the money itself was not enough to establish good faith conduct, at least where the other employee was not a "salesman" as anticipated under company policy. But although the employer's alleged bad faith termination may well have breached the covenant with respect to an at-will employee, Fortune's remedy was not reinstatement but rather the payment of benefits he would have earned but for the fact he was discharged. The Massachusetts court, like its sister courts in Idaho and Arizona, adopted the covenant in order to redress violation of a definite term—in this instance, compensation—contained in an employment agreement that was indefinite with respect to job security. This approach effectively allows a court to reconcile the covenant with the continued validity of at-will employment.[56]

2. Employer Misrepresentations Affecting the Term of Job Security

A second—and less frequent—approach focuses on employer misrepresentations that more directly implicate the contract term of job security. Under this approach, the covenant may apply if an employer misrepresents its present intentions and the employee relies on this misrepresentation to accept a new job or to continue in a current position. In *Merrill v. Crothall-American, Inc.*,[57] the Delaware Supreme Court reviewed an employee's claim that his employer had induced him to accept an indefinite-term job offer while secretly intending to keep him on only temporarily until a suitable permanent candidate was identified and hired.[58]

54. *See id.* at 1255–58.

55. For other decisions holding that the covenant prohibits firing for the purpose of preventing an employee from sharing in future profits, see Mitford v. de LaSala, 666 P.2d 1000, 1006–07 (Alaska 1983); Somers v. Somers, 613 A.2d 1211, 1213–14 (Pa. Super. Court 1992); Hall v. Farmers Insurance, 713 P.2d 1027, 1030 (Okla. 1985); Jordan v. Duff & Phelps 815 F.2d 429, 438–39 (7th Cir. 1987) (applying Illinois law).

56. *Compare* FARNSWORTH, *supra* note 14, at 372–76 (discussing case law applying covenant under UCC to mitigate the harshness of termination-at-will rule traditionally used for exclusive distributorship and franchise agreements); cases cited at *supra* notes 29–30 (same).

57. 606 A.2d 96 (Del. 1992).

58. *See id.* at 98–99. Employee Merrill's allegations, viewed favorably on the appeal from a dismissal, were that he was hired merely so his employer could fulfill its contractual obligation to find a director of plant operations and that his eventual replacement was interviewed two days after he himself had been hired. *Id.*

The court held that the covenant applies to the formation of employment contracts, and a breach may be shown by establishing that the employer's conduct in negotiating the job security provision is tantamount to fraud, deceit, or misrepresentation.[59] In this instance, Merrill had pleaded a valid claim because he received less than what he bargained for respecting job security: "an employer may not in good faith knowingly allow an employee to assume that the duration of an employment contract is indefinite, when it is, in secret contemplation of the employer, of limited duration."[60] The court added that the proposed or reasonably anticipated longevity of an employment contract is "clearly material to one's decision to accept a new position, especially where, as here, the assumption of the new position requires surrender of present employment."[61] The court cautioned, however, that its holding dealt only with employer deception on the issue of duration, a deception that induced the employee to form a contract. Because Merrill's subsequent firing merely gave effect to the earlier deception, the court did not rest its holding on what might constitute just grounds for terminating an at-will arrangement.[62]

Four years after *Merrill*, the Delaware Supreme Court decided the covenant also could apply to conditions related to a termination even though no legally cognizable harm arises from the termination itself. In *DuPont de Nemours and Co. v. Pressman*,[63] the employee was an engineer at DuPont who received positive evaluations and pay raises until he suggested to his supervisor that the supervisor might have a conflict of interest as an advisor to an outside company. Pressman alleged that the supervisor became angry with him when he raised this issue, and that over the ensuing months the supervisor launched a campaign to discredit him by creating false negative information about his job performance and concealing positive information.[64]

The Delaware court observed that Pressman's claim did not implicate considerations of public policy incident to his firing, because he did not assert any public interest that was recognized by a legislative,

59. *Id.* at 101. Extension of the covenant to contract *formation* goes beyond the Restatement and UCC, which address contract performance and enforcement. *See supra* notes 23. *See also infra* at Section II.E.2. for further discussion of this distinction.

60. 606 A.2d at 102. This absence of good faith did *not* amount to fraud in the inducement according to the Delaware court. Although Merrill alleged that his employer misrepresented the position as "permanent," he accepted the job knowing he was to be an at-will employee. What he did not realize was that the employer had a plan for implementing his at-will status that was itself deceitful at the time of contract formation.

61. *Id.* at 102.

62. *Id.*

63. 679 A.2d 436 (Del 1996).

64. *See id.* at 439, 444.

administrative, or judicial authority.[65] Nonetheless, the court concluded that if the jury believed Pressman's allegations, they would amount to a breach of the covenant. The court distinguished these allegations from evidence that an employer might discharge an employee "maliciously, that is, as a result of hatred [or] ill will."[66] Discharging an employee based on a supervisor's personal animosity was permissible under the at-will doctrine. But using deceit and subterfuge to manufacture false grounds for discharge by the supervisor's superiors "went beyond the broad, permissible scope of the Doctrine and crossed into the limited zone of the Covenant."[67]

These first two groups of cases involve justifications that sound in contract rather than tort. State courts in both instances viewed the covenant as protecting identified benefits of the employment bargain. In *Metcalf* and *Fortune*, the bargained-for benefit is a term other than job security. In *Merrill* and *Pressman*, the contract term at issue is job security, but "good faith" is quite narrowly defined. The covenant confers protection only against discharges premised on fraudulent or deceitful manipulation of the employee's indefinite-term arrangement. These two contract-based approaches may have limited impact for many if not most employees. For a start, employees and employers may lack a clear understanding about initially negotiated terms, especially terms related to job security.[68] In addition, discharges resulting from an employer's manipulation or misrepresentation of particular negotiated terms and conditions are likely to be unusual as compared with discharges that are simply arbitrary, negligent, or even malicious without being motivated by an attempt to negate or recapture aspects of the earlier bargain.

3. Tort-Based Justifications

Two other sets of decisions involve justifications for the covenant that sound in tort. One essentially treats violation of the covenant as a subset of the public policy exception to at-will employment. The New Hampshire Supreme Court initially held that firings based on retaliation, malice, or bad

65. *See id.* at 441–42.

66. *Id.* at 444.

67. *Id. See also* Crenshaw v. Bozeman Deaconess Hospital, 693 P.2d 487, 490, 492 (Mont. 1984) (affirming judgment based on discharged employee's claim that employer acted with malice by lodging false charges against her and tampering with her personnel file)

68. *See* Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1994–95 (1996) (identifying "significant strategic barriers" to negotiations at hiring stage, including "mutual temptation toward wooing" and difficulty for employees to raise conditions of discharge "without appearing to reveal a propensity for shirking"); Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1250–51 (1992) (contending that employers and employees are often not clear about the specifics of their bargain, especially at the outset of their relationship).

faith constituted a breach of the covenant because they were "not in the best interest of the economic system or the public good."[69] It subsequently has confined the scope of the covenant to firings based on employee performance of an act that public policy would encourage, or employee refusal to engage in conduct that public policy would condemn.[70] By making this change, the New Hampshire court effectively eschewed reliance on the doctrine of integrity-of-contracts as important enough to include within the public policy exception. Implicit in the court's shift is an acceptance of the notion that the absence of good faith or fair dealing involves harm to the contracting parties but not to society as a whole.

The other tort-based justification involves a breach outside the at-will setting—violating contractual limits on the employer's right to terminate—when the employer acts with malice. The Nevada Supreme Court has applied the covenant to protect employees with long-term employment contracts (express or implied) who are discharged in bad faith, for reasons such as to prevent the vesting of retirement benefits,[71] or to retaliate for truthful courtroom testimony.[72] The court reasoned that a breach of the covenant exists and gives rise to tort liability in those instances when a special element of trust, dependency, and reliance is present between employee and employer, comparable to what exists between an insured party and her insurer.[73] Faithful long-term employees with reasonable expectations of lifetime or continuing jobs may seek tort damages for their employer's betrayal of trust in such settings.[74] But at-will employees do not enjoy this special relationship of trust and reliance, and the Nevada court has made clear that the covenant does not apply to them at all.[75]

69. Monge v. Beebe Rubber Co. 316 A.2d 549, 551 (N.H. 1974).

70. *See* Cloutier v. Great Atlantic & Pacific Tea Co., 436 A.2d 1140, 1143 (N.H. 1981); Howard v. Dorr Woolen Co., 414 A.2d 1273, 1274 (N.H. 1980). *See also* Smith v. American Greetings Co., 804 S.W.2d 683, 684 (Ark. 1991); Luedke v. Nabors Alaska Drilling Co., 768 P.2d 1123, 1130 (Alas. 1989).

71. *See* Kmart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987) (abrogated with respect to retirement benefits on ERISA preemption grounds, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990)).

72. *See* Shoen v. Amerco Inc., 896 P.2d 469 (Nev. 1995).

73. *See Ponsock, supra* 732 P.2d at 1371–73.

74. *See Schoen*, 896 P.2d at 475–76. *See also* Wilder v. Cody Co. Chamber of Commerce, 868 P.2d 211, 220–21 (Wyo. 1995) (recognizing a tort claim for breach of the covenant when special relationship of trust and reliance exists between employee and employer).

75. *See* Sands Regent v. Valgardson, 777 P.2d 898, 899 (Nev. 1989); Smith v. Cladianos, 752 P.2d 233, 235 (Nev. 1988). *See also* Loghry v. Unicover Corp. 927 P.2d 706, 711–12 (Wyo. 1996) (declining to recognize cause of action for breach of the covenant under a contract theory); Life Care Centers of America v. Dexter, 65 P.3d 385, 394–95 (Wyo. 2003) (declining to recognize tort action for breach of the covenant because employee's six years of employment for employer, without more, was insufficient to establish a special relationship).

D. Rejecting and Criticizing the Covenant: Majority Rule

1. Limited Rationales for Rejection

The majority of states do not recognize the covenant in the employment setting, and have propounded various rationales for refusing to do so. Preliminarily, a somewhat puzzling justification relies on the purported vagueness of the underlying good faith definition. The Wisconsin Supreme Court rejected the covenant primarily because to do otherwise would "subject each discharge to judicial incursions into the amorphous concept of bad faith."[76] Other states have invoked this vagueness rationale as well.[77]

It is far from clear, however, that bad faith is all that amorphous a concept. One judicially proffered test states that a discharge is in bad faith "if and only if [the employer] does not believe he has a legal right to discharge the employee."[78] An alternative formulation defines bad faith as "conduct by the employer extraneous to the employment contract aimed at frustrating the employee's enjoyment of contractual rights."[79] Even if one concludes the standard should be more fine-grained than these examples, state judges seem quite capable of adding appropriate texture. States have developed a range of nuanced approaches to other employment-related common law concepts such as the scope of the public policy exception[80] or the contours of a valid disclaimer in an employee handbook.[81] Moreover, given that "good faith" and "fair dealing" have been widely applied in non-employment settings under the UCC, courts should be able to develop comparably acceptable approaches for employment contracts as well.

Another explanation for rejecting the covenant is legislative foreclosure. Arizona has codified certain exclusive grounds for employees to challenge their discharges.[82] Those grounds include violation of a written contract that expressly restricts the employer's right to terminate, but not the breach of any implied terms or conditions.[83] Arizona's law was

76. Brockmeyer v. Dun & Bradstreet, 335 N.W. 2d 834, 838 (Wis. 1983).

77. *See, e.g.,* Hinson v. Cameron, 742 P.2d 549, 554 (Okla. 1987); Parnar v. Americana Hotels, Inc. 652 P.2d 625, 629 (Haw. 1982).

78. Foley v. Interactive Data Corp. 765 P.2d 373, 409 (Cal. 1988) (Broussard, J., dissenting).

79. Melnick v. State Farm Automobile Ins. Co., 749 P.2d 1105, 1009 (N.M. 1988).

80. For California, examples include Gantt v. Sentry Ins., 824 P.2d 680, 684, 687–88 (Cal. 1992) and Gen. Dynamics Corp. v. Superior Court of San Bernadino Co., 876 P.2d 487, 498–501 (Cal. 1994). For Illinois, examples include Balla v. Gambro, Inc., 584 N.E. 2d 104, 107–11 (Ill. 1991) and Parr v. Triplett Corp., 727 F.Supp. 1163, 1165–67 (N.D. Ill. 1989).

81. For New Jersey, see, for instance, Nicosia v. Wakefern Food Corp., 643 A.2d 554, 559–62 (N.J. 1994); Woolley v. Hoffman-LaRoche, 491 A.2d 1257, 1258 (N.J. 1985). For Wyoming, see, for instance, McDonald v. Mobil Coal Producing Inc., 820 P.2d 986, 988–89 (Wyo. 1991); Jiminez v. Colorado Interstate Gas Co., 690 F.Supp. 977, 980 (D. Wyo. 1988).

82. *See* Ariz. Rev. Stat. Ann § 23-1501 (1996).

83. *See id.* at § 23-1501 (1), (2), (3)(a).

enacted in response to the *Wagenseller* decision,[84] and its exclusive grounds for wrongful termination claims are by now well settled.[85]

Relatedly, the Montana Supreme Court had applied the covenant to employment contracts and awarded punitive damages for breach since the early 1980s,[86] but the Montana legislature curtailed the impact of these decisions in 1987 as part of its Wrongful Discharge from Employment Act.[87] Montana's statute establishes as elements of wrongful discharge an absence of good cause—legislatively defined—and also an employer's violation of its express written personnel policies.[88] The statute, however, limits recovery for these violations to lost wages and benefits, eliminating access to punitive damages.[89]

2. More Widespread Rationales for Rejection

Notwithstanding the statutory initiatives in Arizona and Montana, legislative foreclosure is seldom a basis for refusing to apply the covenant.[90] Rather, state jurisdictions rely more heavily on the common law to shape, monitor, and enforce contractual aspects of the employment relationship.[91] In that regard, two common-law-related justifications have emerged for rejecting the covenant. The first focuses on extrinsic factors: the covenant may be redundant given other common law options available to discharged or exploited employees. The second involves a matter of

84. *See supra* at notes 43–46 and accompanying text.

85. *See, e.g.*, White v. AKDHC, 664 F.Supp.2d 1054, 1061–62 (D. Ariz. 2009); Fallar v. Compuware Corp. 202 F.Supp.2d 1067, 1075–76 (D. Ariz. 2002). South Dakota is a second jurisdiction that has created by statute exclusive grounds for terminating the employment relationship. *See* S.D. Laws, 60-4-4 (stating that "An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute").

86. *See, e.g.*, Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1067 (Mont. 1982) (recognizing covenant as implied in employment handbook); Gates v. Life of Mont. Ins. Co., 668 P.2d 213, 214–15 (1983) (sustaining award of punitive damages for breach of covenant); Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487, 492 (Mont. 1984) (holding that probationary at-will employee is owed duty of good faith and may receive punitive damages).

87. *See* MONT. CODE ANN. § 39-2-901 (1987).

88. *See id.*, § 4(1)(b),(c); the definition of "good cause" is at *id.* § 3(5). Montana is the only state to enact a statute prohibiting termination without good cause, although the Virgin Islands also has a wrongful discharge law specifying valid grounds for dismissal. *See* 24 V.I. CODE ANN. § 76 (1986).

89. *See* MONT. CODE. ANN., § 5(1). The Montana statute also prohibits discharges in violation of public policy, and tort damages are available under that provision. *See id.*, §§ 4(1)(a), 5(2).

90. Other jurisdictions specifying valid statutory grounds for dismissal do not address the covenant in relation to these grounds. *See* 24 V.I. CODE ANN. § 76 (discussed *supra* at note 88); 29 P.R. LAWS ANN. § 185b (2008) (Puerto Rico).

91. A different legislative-foreclosure argument is premised on inaction: because the state legislature has not modified the contractually-grounded rule of employment at will, courts should not do so by imposing requirements such as the covenant. *See* Murphy v. American Home Products, 448 N.E.2d 86, 89–90 (N.Y. 1983). Of course, the at-will term of employment contracts was created in the first instance as a matter of common law, and it is far from clear why legislative silence should preclude courts from subsequently modifying the term or even renouncing it as a matter of common law.

internal coherence: the covenant may be incompatible with the concept of at-will employment.

A number of states have suggested that the covenant is unnecessary in light of other established or evolving causes of action available to employees. For state courts that view the covenant as covering only terminations in violation of independently defined public policy, a cause of action for breach of the covenant becomes duplicative of claims based on the public policy exception.[92] Some state courts have sidestepped the need for an implied-in-law covenant by invoking implied-in-fact contract theories based on employee manuals or an employer's oral representations and longstanding informal practices.[93] And still others have suggested that unfair treatment can be addressed in the employment setting through the doctrines of promissory estoppel[94] or quantum meruit.[95] Some of these courts have embraced the language and rhetoric of good faith and fair dealing but they have done so while applying a non-covenant-based cause of action.[96]

The redundancy argument invokes other common law doctrines to reduce if not eliminate the covenant's domain. This argument in turn reflects states' underlying uncertainty about the need for a generalized legal norm of good faith and fairness in employment contracts. Broadly speaking, a discharge that is unfair as a matter of law can be viewed as violating the state's promulgated norms on fairness—typically expressed in its statutes and regulations and therefore already protected by the public policy exception.[97] A discharge that is manipulative or opportunistically motivated without implicating unlawful conduct or recognized public obligations may still be viewed as unfair or in bad faith, because it induces detrimental reliance by the employee or because it leaves the employee uncompensated for mutually anticipated performance. The harm of detrimental reliance is addressed under the doctrine of promissory

92. *See* cases discussed *supra* at note 70 and accompanying text.

93. *See, e.g.*, McIlravy v. Kerr-McGee Corp., 119 F.3d 876 (10th Cir. 1997) (applying Wyoming law) (employee handbook); Witkowski v. Lipton, Inc. 643 A.2d 546 (N.J. 1994) (employee manual); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. App. 1981) (employer oral representations). *See generally* Schwab, *supra* note 31.

94. *See, e.g.*, Bowers v. AT&T Technologies, Inc., 852 F.2d 361, 363–66 (8th Cir. 1988) (applying Missouri law); Peck v. Imedia Inc., 679 A.2d 745, 753 (N.J. Super. Ct. App. Div. 1996).

95. *See, e.g.*, Fred Ezra Co. v. Pedas, 682 A.2d 173, 175–77 (D.C. Ct. App. 1996); Eaton v. Engelcke Mfg. Co., 681 P.2d 1312, 1314–15 (Wash. Ct. App. 1984).

96. *See, e.g.*, Peck v. Imedia, 679 A.2d at 753 (applying promissory estoppel); Luedke v. Nabors Alaska Drilling Co., 768 P.2d 1123, 1130 (Alaska 1989) (invoking public policy considerations); Cloutier v. Great Atlantic & Pacific Tea Co., 436 A.2d 1140, 1143 (N.H. 1981) (same).

97. *See* Gantt v. Sentry Insurance, 824 P.2d 680, 684 (Cal. 1992) (identifying four generally agreed-upon categories in which state courts find violations of public policy: (i) refusing to violate a statute; (ii) performing a statutory obligation; (iii) exercising a statutory right or privilege; and (iv) reporting an alleged violation of a statute of public importance).

estoppel;[98] the injury of uncompensated performance may be redressed under the doctrine of quantum meruit.[99] Even when broadly applicable doctrines like public policy or promissory estoppel do not apply, the employment relationship typically encompasses multiple terms and conditions implemented over an extended period of time. Accordingly, there are often past representations and practices—written and oral—that give rise to fact-based claims alleging unfair or bad faith conduct, claims that are based on the reasonably inferred intent of the particular parties.[100] In sum, given the diverse options available under tort and contract law for employees who are unfairly discharged or exploited, it is not surprising that many courts have struggled with the need for a separate affirmative requirement of good faith and fair dealing.

Beyond considerations of redundancy, the most widespread state court opposition stems from a perceived conflict between the covenant and the doctrine of employment-at-will. One court noted that the at-will rule allows employers to discharge their employees "arbitrarily and capriciously absent a violation of public policy or an [express] agreement to the contrary," and reasoned that this employer right was wholly inconsistent with an implied covenant of good faith and fair dealing.[101] Another court opined that to recognize the covenant "would require the imposition of a duty of care upon an employer when discharging an employee [that] would radically alter the long recognized doctrine allowing discharge for any reason or no reason at all."[102] Other state courts also have focused on tension between the covenant's imposition of a duty and the employer's pre-existing right to terminate for any reason—including a bad faith reason—as part of managing its workforce.[103]

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98. *See* Grouse v. Group Health Plan Inc. 306 N.W.2d 114, 116 (Minn. 1981) (holding that pharmacist whose job offer was revoked was entitled to recover damages for what he lost in quitting his former job and in declining other employment); RESTATEMENT OF CONTRACTS § 90 (providing that "a promise which the promisor should reasonably expect to induce action or forbearance by the promisee or a third person, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise").

99. Courts may award recovery under a quantum meruit theory when employees perform work for an employer at her request but without an express contract. *See, e.g., Fred Ezra Co.*, 682 A.2d at 176–77; *Eaton*, 681 P.2d at 1315; Tinney v. Tessier Realtors, Inc., 447 So.2d 1099, 1101–02 (La. Ct. App. 1984). *See generally* Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. L. REV. 547, 582–86 (1986).

100. *See* cases cited *supra* at note 93.

101. Cockels v. Int'l Bus. Expositions, 406 N.W.2d 465, 468 (Mich. App. 1987).

102. Huegerich v. IBP, Inc., 547 N.W.2d 216, 220 (Iowa 1996) (discussing doctrine of negligent discharge, which it described as closely analogous to the covenant).

103. *See, e.g.*, Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Maine 1991); Hillesland v. Fed. Land Bank Ass'n of Grand Forks, 407 N.W. 2d 206, 214 (N.D. 1987); Hunt v. IBM Mid Am. Emp. Fed. Credit Union, 384 N.W.2d 853, 858–59 (Minn. 1986); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 838 (Wis. 1983); Edelman v. Franklin Iron & Metal Corp., 622 N.E.2d 411, 414 (Oh. Ct. App. 1993).

New York's highest court has been especially forceful about what it regards as the incoherence of adopting the covenant in an employment setting.[104] Acknowledging that the covenant is well-established in the commercial context, the court stressed that it can be implied "only where the implied term is consistent with other mutually agreed upon terms in the contract."[105] One such term in every at-will employment contract is that "the law accords the employer an unfettered right to terminate employment at any time."[106] In short, "it would be incongruous" to draw any inference "that the employer impliedly agreed to a provision which would be destructive of his [unrestricted] right of termination."[107]

As the New York court recognized, the terms "good faith" and "fair dealing" have developed a set of meanings in the context of commercial contracts where parties have an agreed common purpose and justified expectations. But in employment-at-will, where the parties have agreed that the employee may be terminated for any reason including a bad reason, *there may be no justified expectations* regarding an employee's continuing employment from one day to the next. The parties may decide to restrict the employer's right to discharge, both substantively and procedurally, by express agreement.[108] Under these circumstances, to imply a restriction on discharge-related conduct from the existence of a contract that includes an unrestricted right to discharge seems problematic.

What is problematic, however, may not be fatal. As long as the core of the breach is not termination per se but termination before certain benefits have been received,[109] or before other justified expectations have been realized,[110] there may be tension without irreconcilable conflict. Indeed, such implied protections against discharge for exercising a contractual right or privilege might be seen as analogous to protections implied under tort law against discharge for exercising a statutory or other public right or privilege. Still, what is implied under the public policy exception is an extension of the public policy itself—as when one cannot be fired for filing a workers' compensation claim or for serving on a jury. In the contract setting, it remains odd to think of an at-will employer as having impliedly

104. *See, e.g.*, Sabetay v. Sterling Drug, Inc. 506 N.E.2d 919, 922 (N.Y. 1987); Murphy v. American Home Products, 448 N.E.2d 86, 91 (N.Y. 1983).

105. *Sabetay*, 506 N.E.2d at 922.

106. *Id.*

107. *Id.*

108. A substantive limit might include prohibiting discharges for use of allotted sick leave or based on efforts to collect earned commission payments. A procedural limit might include requiring some period of advance notice, a warning, or even a meeting or hearing before implementing a discharge.

109. *See, e.g.*, Metcalf v. Intermountain Gas. Co., 778 P.2d 744 (Id. 1989); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1255–58 (Mass. 1976).

110. *See, e.g.*, Merrill v. Couthall-American Inc., 606 A.2d 96, 101–02 (Del. 1992); E.I. DuPont De Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996).

agreed as a matter of law to any term that would be destructive of his right to fire his employees.

3. Remorse Following Earlier Embrace

In retrospect, the covenant's halcyon days within American employment law probably occurred during the 1980s. Courts began to embrace the concept of an employer duty of good faith and fair dealing in several leading cases decided between 1974 and 1980.[111] These initial formulations were vigorous and open-ended. Courts concluded that for all employment contracts—including at-will contracts—there is a public interest in balancing the employer's need to operate his business as he sees fit against the employee's need to keep his job.[112] The covenant was part of "a continuing trend toward recognition . . . of certain implied contract rights to job security, necessary to ensure social stability in our society."[113] Accordingly, termination of at-will employment "which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."[114]

The Restatement's pronouncement that "*every contract* imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"[115] furnished grounds for further optimism. One law review commentator even suggested that the covenant might become the leading edge in judicial efforts to modify the rule of employment-at-will:

> The implication of a duty to terminate only in good faith. . .is perhaps the most appealing area for judicial development in the at will area because it is consistent with a recognition that at will terminations do not necessarily reflect the parties' intentions or best interests with respect to job security. Because employers and employees do not have the opportunity to engage in informed bargaining, courts following *Fortune* simply supply a reasonable term.[116]

During the 1980s, courts in a number of states applied the covenant to employment contracts for the first time.[117]

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111. *See* Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974); *Fortune*, 364 N.E.2d at 1255–58; Cleary v. Am. Airlines, 111 Cal. App. 3d 443, 453–56 (Cal. Ct. App. 1980).

112. *See Monge*, 316 A.2d at 551 (cited with approval in *Fortune*, 364 N.E.2d at 1257).

113. *Cleary*, 111 Cal. App. 3d at 455.

114. *Monge*, 316 A.2d at 551.

115. RESTATEMENT (2D) OF CONTRACTS § 205 (1981) (emphasis added).

116. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1838 (1980).

117. *See, e.g.*, Metcalf v. Intermountain Gas. Co. 778 P.2d 744 (Id. 1989); Hoffman La-Roche v. Campbell, 512 So. 2d 725, 738 (Ala. 1987); Kmart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987); Tymshare v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1987) (inferring that Virginia recognizes covenant

Since this surge of enthusiasm, however, judicial interest in the covenant has notably abated. After 1990, it appears that only two states have joined the initial group endorsing good faith.[118] By contrast, a far greater number of state courts have announced or reiterated their rejection of the covenant in the employment setting.[119]

In addition, courts that had recognized good faith have retreated with respect to the scope of their commitment. As previously discussed, the New Hampshire Supreme Court abandoned its conclusion that bad faith or malicious termination of at-will employees automatically amounted to a breach of the covenant. The court held instead that such employer misconduct was unlawful only if it also violated the state's public policy.[120] This narrower approach was then adopted by other courts.[121]

The California Supreme Court has retrenched as well. A series of decisions by intermediate appellate courts had authorized tort damages for bad faith discharges in violation of the covenant.[122] In 1988, however, the Supreme Court in *Foley v. Interactive Data Corp.*[123] held that breach of the covenant by an employer gave rise only to contract damages. The California court recognized that tort damages were regularly available for breach of the covenant in the context of insurance contracts. But the majority distinguished insurance companies from employers by viewing insurers as suppliers of a quasi-public service whose contractual obligations were analogous to those of a fiduciary.[124] Importantly, the California court further reasoned that given the adhesive nature of insurance contracts, the

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in employment cases); Hall v. Farmers Ins. Exch. 713 P.2d 1027 (Okla. 1985); Mitford v. de LaSala, 666 P.2d 1000 (Alas. 1983).

118. *See* Merrill v. Crouthall-American Inc., 606 A.2d 96, 101–02 (Del. 1992); Wilder v. Cody Co. Chamber of Commerce, 868 P.2d 211, 222 (Wyo. 1994).

119. *See, e.g.*, City of Midland v. O'Bryant, 18 S.W.3d 209, 213–16 (Tex. 2000); Kerrigan v. Britches of Georgetowne Inc. 705 A.2d 624, 626–27 (D.C. Ct. App. 1997); Ross v. Times Mirror Inc., 665 A.2d 580, 586 (Vt. 1995); Miller v. Massachusetts Mut. Life Ins. Co., 455 S.E. 2d 799, 802–03 (W.Va. 1995); Pacheco v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993); Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Me. 1991); Suburban Hosp. Inc. v. Dwiggins, 596 A.2d 1069, 1077 (Md. Ct. App. 1991); Brehany v. Nordstrom Inc., 812 P.2d 49, 55–56 (Utah 1991). *See also* Baradell v. Board of Soc. Services Pittsylvania Co., 970 F. Supp. 489, 494 (W.D. Va. 1994) (stating that Virginia does not recognize the covenant in employment cases).

120. *See* Cloutier v. Great Atlantic & Pac. Tea Co., 436 A.2d 1140, 1143 (N.H. 1981); Howard v. Dorr Woolen Co., 414 A.2d 1273, 1274 (N.H. 1980).

121. *See* Smith v. Am. Greetings Co., 804 S.W.2d 683, 684 (Ark. 1991); Luedke v. Nabors Alaska Drilling Co., 768 P.2d 1123, 1130 (Alaska 1983).

122. *See* Wallis v. Superior Court, 160 Cal. App. 3d 1109, 1116 (Cal. Ct. App. 1984); Rulon-Miller v. Int'l Business Machines Inc., 162 Cal. App. 3d 241, 247–48 (Cal. Ct. App. 1984); Cleary v. American Airlines, 111 Cal. App. 3d 443, 453–56 (Cal. Ct. App. 1980). *See generally* Foley v. Interactive Data Corp., 765 P.2d 373, 404–405 (1988) (dissenting opinion) (discussing eight unanimous Court of Appeal decisions permitting tort actions for bad faith discharges).

123. 765 P.2d 373 (Cal. 1988).

124. *See id.* at 390, 394, 396.

relationship of insurer and insured is "inherently unbalanced" in a way that employee-employer relationships are not.[125]

The *Foley* decision, issued by a closely divided court,[126] altered the remedial landscape for breach-of-covenant claims. United States courts do not ordinarily permit punitive damages or emotional distress damages for breach of contract, at least when unaccompanied by a tort. Without access to punitive awards or to damages for emotional harm, there is a reduced incentive for discharged employees to bring claims based on the covenant as contrasted with tort-based claims alleging public policy violations, defamation, or intentional infliction of emotional distress.[127] A number of states have followed California's lead in the years since *Foley*. Some have disallowed tort remedies altogether.[128] Others have restricted tort actions to covenant violations involving long-term employees with firmly embedded expectations, whose trust and dependency on their employer's good faith is explicitly analogized to the insurance setting.[129] In sum, the covenant's diminished application to employment contracts reflects elements of judicial remorse among some states that had been early supporters.

E. Additional Conundrums

1. Lack of Mutuality

A further concern regarding the covenant's applicability in the employment setting, raised in scholarship if not state courts, involves the possible lack of mutuality.[130] Unlike contracting parties in a standard commercial context, employers and employees do not typically bring comparable resources or equivalent expectations to the relationship. The question arises as to what if any good faith duties an employee owes to her employer that might justify imposing a comparable obligation upon her employer to act honestly and observe basic norms of fair dealing.

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125. *See id.* at 390, 396.

126. The vote was 4–3, and the dissenting judges focused on the contract v. tort issue. *See id.* at 402–412 (Broussard, J., concurring and dissenting); *id.* at 412–18 (Kauffman, J., concurring and dissenting); *id.* at 418 (Mosk, J., joining opinions of Broussard and Kaufman).

127. *See generally* David J. Jung, *Jury Verdicts in Wrongful Termination Cases*, Parts IV.D., VII (Pub. Law Research Inst., Univ. of Cal., Hastings Coll. of the Law 1997) (reporting that average and median wrongful termination verdicts in California from 1992-96 were lower for contract cases than tort cases, and emphasizing the impact of California court's decision to eliminate punitive damages for cases based on breach of contract).

128. *See, e.g.*, Grant v. Butler, 590 So.2d 254, 256 (Ala. 1991); Varnado v. Roadway Express, 557 So.2d 413, 415 (La. Ct. App. 1990).

129. *See, e.g.*, Shoen v. Amerco, 896 P.2d 469, 476 (Nev. 1995); Sands Regent v. Valgardson, 777 P.2d 898, 899 (Nev. 1989); Life Care Centers of America v. Dexter, 65 P.3d 385, 394–95 (Wyo. 2003); Loghry v. Unicover Corp., 927 P.2d 706, 711–12 (Wyo. 1996).

130. *See* Robert C. Bird, *An Employment Contract "Instinct With an Obligation": Good Faith Costs and Contexts*, 28 PACE L. REV. 409, 417–21 (2008).

One response might be to invoke aspects of the employee's obligation to render loyal and faithful service. If an employee were to divert business to a competitor, or disparage the employer's products or services, or disclose confidential information, such conduct could be viewed as depriving her employer of key benefits of the contract.[131] These kinds of disloyal or unfaithful acts by employees are in fact monitored and regulated, but not pursuant to the covenant of good faith. Rather, as Benjamin Aaron and Matthew Finkin observed more than a decade ago, employers typically challenge such employee conduct based either on separate non-compete covenants or on statutory and common law tort theories relating to misappropriation or breach of trust.[132]

It is worth noting that in several other countries where good faith is recognized in more robust and meaningful terms, mutual obligations are expressly integrated as part of its scope.[133] In these legal systems, at least some of employee's responsibilities to render loyal and faithful service are understood to stem from the covenant.[134] By contrast, the primary employee duties of loyalty under U.S. law—nondiversion of employer business to a competitor while still employed, nondisclosure of confidential information, nondisparagement of the employer's products and services—seem to be grounded in the earlier, hierarchical master-servant relationship rather than in more contemporary, egalitarian contractual norms.[135] But whatever the historical explanation, courts' lack of attentiveness to mutual obligations or responsibilities under the covenant is one more indication of its awkward place in the employment setting.

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131. *See generally* Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 322–23, 330, 337 (1999).

132. *See id.* at 324–25 (discussing covenants not to compete); *id.* at 322–23, 326–27 (discussing misappropriation of future business opportunities, trade secrets, customer contacts, or company good will); *id.* at 337 (discussing disclosure of confidential information as breach of trust). *See, e.g.*, Beard Research v. Kates, 8 A.3d 573, 589–612 (Del. Ch. 2010) (discussing misappropriation of trade secrets and customer contacts, misuse of confidential information, and tortious interference with future business opportunities); Lamorte Burns & Co., Inc. v. Walters 770 A.2d 1158, 1168–69 (N.J. 2001) (discussing disclosure of confidential information as breach of duty of loyalty). For a rare example of a lower state court construing an employee's duty of loyalty as related to the covenant, see Cary Corp. v. Linder, No. 80589 2002 WL 31667316 at *6 (Oh. App. 2002).

133. *See* Bogg, *supra* note 11, at 138–41 (focusing on employees' implied duty of fidelity in context of industrial action); Andrew Stewart, *Good Faith: A Necessary Element in Australian Employment Law?*, 32 COMP. LAB. L. & POL'Y J. 519, 521–23, 534 (2011) (addressing employees' duty of faithful service and also mutual duty of cooperation and non-hindrance of contract purposes); Vigneau, *supra* note 11, at 104–07 (addressing good faith restrictions on various employee rights).

134. *See* sources discussed at note 133.

135. *See* Robert W. Gordan, *Using History in Teaching Contracts: The Case of* Britton v. Turner, 26 U. HAW. L. REV. 423, 428–29 (2004) (discussing how nineteenth century treatises grouped domestic and industrial employment under the same master-servant categories: servants, like wives, were a form of masters' property, owing an unqualified duty of loyalty to the masters' interests although employers had no corresponding duty to look after their employees' interests beyond caring for them in sickness or old age). *See generally* TOMLINS, *supra* note 9; Karsten, *supra* note 9.

2. Good Faith Prior to Contract Formation

As defined by the UCC and the Restatement, the covenant imposes obligations during contract performance and enforcement but not during the earlier period of contract negotiation and formation.[136] In the employment setting, Delaware is the rare exception. Its supreme court has applied the covenant to bad faith employer conduct at the contract formation stage.[137] In doing so, the Delaware court made clear that when an employer acts deceitfully to manipulate what was bargained for regarding job security, a claim for breach of the covenant sounds only in contract. The court declined to authorize the traditional tort remedies of punitive awards or damages for emotional distress.[138]

In addition to Delaware, however, many states protect employees at the hiring stage by authorizing tort law claims against employers for fraudulently inducing workers to enter an at-will relationship. One scholarly study concluded that the cause of action is recognized in virtually every jurisdiction,[139] even as many jurisdictions express concerns about tension between employee claims and the at-will doctrine.[140] The study reviewed 272 reported decisions between 1990 and 2002 that involved over 750 claims for fraudulent inducement in hiring.[141] It identified four major recurring fact patterns associated with these cases, and found that employees were successful between one-third and one-half the time when alleging employer deceptions with respect to: (1) terms and conditions other than duration or job security; (2) duration of employment and/or job security; (3) the employer's future prospects (such as economic and market strength); and, (4) the nature of the job or primary job functions.[142]

There is, undeniably, tension between the at-will doctrine and employee claims challenging discharges that result from fraudulent misrepresentations by employers. A number of courts have concluded that

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136. *See* notes 2 and 3 *supra*.

137. *See* text accompanying notes 57–62 *supra* (discussing *Merrill*).

138. *See* E.I. DuPont De Nemours & Co. v. Pressman, 679 A.2d 436, 444–48 (De. 1996).

139. Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233, 255 & n.60 (2005) [hereinafter Perna I]. *See generally* Richard P. Perna, *Deceitful Employers: Intentional Misrepresentation in Hiring and the Employment at Will Doctrine*, 54 U. KAN. L. REV. 587 (2005-06) [hereinafter Perna II]; Sandra J. Mullings, *Truth-in-Hiring Claims and the At-Will Rule: Should An Employer Have a License to Lie?* 1997 COLUM. BUS. L. REV. 105 (1997).

140. *See* Perna I, *supra* note 138, at 276–77 (referring to courts that regard hiring-fraud actions as an attempt to circumvent the at-will doctrine by using tort theory to address a wrongful discharge); Perna II, at 634 (discussing courts that bar hiring-fraud actions brought following termination on theory that a prospective employee could not reasonably rely on an employer's assertions when the prospective employment is at will).

141. *See* Perna I, *supra* note 138, at 237–38.

142. *Id.* at 243–44. A fifth, much smaller, category involved employer deception respecting pension or other employee benefits. *Id.*

at-will employees have no claim for intentional misrepresentation to induce *continued employment*,[143] or for being fraudulently *"set up" for termination*.[144] These courts reason that because the at-will doctrine allows for discharge on malicious or similarly improper grounds, even reprehensively fraudulent conduct triggering termination is not actionable. As expressed by one court, "the law will not punish a party for doing by misdirection that which it has a right to do forthrightly."[145]

On the other hand, courts regularly sustain employee claims of fraud that *result in termination but do not arise out of the termination* because they are based on employer misrepresentations regarding the nature or conditions of employment apart from the right to terminate.[146] In the leading case of *Lazar v. Superior Court of Los Angeles County*, an employee alleged he was induced to relocate to California from a secure executive position in New York based on his prospective employer's representations that he would have long-term security working for a financially stable company.[147] When Lazar's job was eliminated two years later, he brought a claim for fraudulent inducement of his employment contract. The California Supreme Court sustained his cause of action. The court reasoned that the employer's misrepresentations were made separate from—not in the course of—Lazar's termination, and that absent these misrepresentations, the employer "would not have been in the position to terminate Lazar, because Lazar . . . would not have consented to the employment contract in the first place."[148]

State jurisdictions have long approved employee causes of action for fraudulent inducement or "hiring fraud." Courts often rely on misrepresentations about the employer's financial strength or organizational stability.[149] They also invoke misrepresentations made to employees regarding certain specific terms and conditions of employment.[150] When

143. *See, e.g.*, Mackenzie v. Miller Brewing Co., 623 N.W.2d 739, 745 (Wisc. 2001) (alleging supervisor misrepresented to employee that his position would not be affected by a reorganization).

144. *See, e.g.*, Wisehart v. Meganck, 66 P.3d 124, 125, 128 (Colo. Ct. App. 2002); Tatge v. Chambers & Owen, Inc. 579 N.W.2d 217, 218–21 (1998); Burrell v. Carraway Methodist Hospitals of Ala., 607 So.2d 193, 196 (Ala. 1992).

145. *Wisehart*, 66 P.3d at 128. *But cf.* Johnson v. Mil-Ken Motors, Inc., 894 P.2d 540, 545–46 (Ore. Ct. App. 1995) (reinstating claim by discharged employee for intentional misrepresentation to induce continuing employment).

146. *See* Mullings, *supra note* 139, at 112, 122–27.

147. 909 P.2d 981, 983–84 (Cal. 1996).

148. *Id.* at 988.

149. *See, e.g.*, Stehm v. Nordam Grp., 170 P.3d 546, 547–49 (Okla. Ct. Civ. App. 2007); McConkey v. Aon Corp. 804 A.2d 572, 585–87 (N.J. Super. Ct. 2002); Meade v. Cedarapids Inc., 164 F.3d 1218, 1223 (9th Cir. 1999) (applying Oregon law); Berger v. Sec. Pac. Info. Sys. Inc., 795 P.2d 1380, 1383–74 (Colo. Ct. App. 1990); Wildes v. Pens Unlimited Co., 389 A.2d 837, 841 (Me. 1978).

150. *See, e.g.*, Betterman v. Fleming Companies Inc., 677 N.W.2d 673, 677 (Wisc. Ct. App. 2004) (misrepresentation regarding terms of employer's medical and disability leave policy); Bemmes v. Pub. Employees Ret. Sys. of Ohio, 658 N.E.2d 31, 34–35 (Ohio Ct. App. 1995) (misrepresentation regarding

upholding these claims, courts point to policy justifications that extend beyond the interests of the contracting parties before them. Thus, the California Supreme Court emphasized "advance[ment of] the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future."[151] Similarly, a federal court applying Louisiana law reasoned that unless at-will employees could maintain hiring-fraud actions, "employers [would be given] carte blanche to make fraudulent promises of job security to induce individuals into short-term employment."[152]

It makes sense in public policy terms that truth-in-hiring claims by discharged employees have been broadly endorsed, in that such claims "appropriately police[] the employment bargaining process for intentional bargaining irregularities."[153] It might well make comparable sense for courts broadly to endorse good faith claims brought as a direct result of employee discharges. Such claims, based on the covenant, could be viewed as appropriately policing intentional bargaining irregularities with respect to job security.[154] Further, the line between tort and contract in this setting has become blurred. Courts approving employee tort claims for hiring fraud have generally awarded damages based on the same benefit-of-the-bargain approach adopted for breaches of the covenant.[155] Awarding damages to the defrauded employee that "will most nearly approximate the benefits he would have realized under the contract had the representations which induced him to contract been true"[156] is strikingly similar to the approach followed by courts that have applied the covenant to protect identified benefits employees would have realized as part of their post-hiring employment bargain.[157]

In the end, however, courts treat covenant breach and hiring fraud differently in analytical terms because an employment relationship already

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employee eligibility for employer's retirement program); Kidder v. AmSouth Bank, 639 So.2d 1361, 1362 (Ala. 1994) (alleging misrepresentation as to employee's working conditions); Franz v. Iolalo Inc., 801 F. Supp. 1537, 1539–42 (E.D. La. 1992) (applying Louisiana law) (alleging misrepresentation as to employee's job security). *See generally* Mullings, *supra* note 139, at 122–30.

151. *Lazar*, 909 P.2d at 990.

152. *Franz*, 801 F. Supp. at 1542.

153. Perna II, *supra* note 139, at 626.

154. The Delaware Supreme Court essentially endorsed this approach in *Pressman*, but it remains the exception.

155. *See, e.g.*, McConkey v. Aon Corp., 804 A.2d 572, 587 (N.J. Super. Ct. 2002) (reporting that "numerous courts have applied the 'benefit-of the bargain' damages rule in cases where the employment was, as here, at-will, notwithstanding the occurrence of intervening events that made the employee's performance impossible, such as termination of a project").

156. *Id.*

157. *See, e.g.*, Mitford v. de LaSala, 666 P.2d 1000, 1006–07 (Alaska 1983); Fortune v. National Cash Register, 364 N.E.2d 1251, 1255–58 (Mass. 1976).

exists in the former setting but not the latter.[158] This distinction in turn reflects the powerful presence of at-will as a default term for most employment contracts. Courts regularly express concern about the fundamental inequalities in information and bargaining power between individuals and prospective employers. But once individuals have entered a contractual employment relationship, judicial concern for employees' vulnerability in the face of "intentional bargaining irregularities" substantially disappears. The continuing vitality of the at-will doctrine is the key factor accounting for this altered perspective.

III. THE PERVASIVE INFLUENCE OF EMPLOYMENT-AT-WILL

A. At-Will's Persistence as a Default Rule

As is well known, American common law departed from its English roots when it developed the at-will rule in the late nineteenth century.[159] The presumption that indefinite-term hirings were terminable at the discretion of either party, that there was no mutuality of obligation regarding job tenure in these contracts, coincided with the rise of laissez-faire capitalism.[160] In the words of a leading legal historian, "[i]f employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor."[161] During the early twentieth century, the Supreme Court constitutionalized the doctrine of mutuality. When invalidating federal and state laws that limited employers' right to discharge their at-will employees, the Court reasoned that "the employer and the employee have equality of right [to discharge or to quit], and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[162]

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158. *See, e.g.*, Betterman v. Fleming Companies Inc., 677 N.W.2d 673, 679–80 (Wisc. Ct. App. 2004) (distinguishing McKenzie v. Miller Brewing Co., 623 N.W.2d 739 (Wisc. 2001), and Tatge v. Chambers & Owen, Inc., 579 N.W.2d 217 (1998)); Kidder v. AmSouth Bank, 639 So.2d 1361, 1362 (Ala. 1994) (distinguishing Burrell v. Carraway Methodist Hospitals of Ala., 607 So. 2d 193 (Ala. 1992)).

159. *See, e.g.*, STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 47–64 (4th ed. 2006); MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 29–33 (6th ed. 2007); 1 WILLIAM BLACKSTONE, COMMENTARIES 413 (1765) (reporting that under English common law, "If the hiring be general without any particular time limited, the law construes it to be a hiring for a year").

160. *See* Feinman, *supra* note 10, at 131–34; Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 116–18 (1982).

161. *See* Feinman, *supra* note 10, at 133.

162. Adair v. United States, 208 U.S. 161, 174–75 (1908) (invalidating federal statute that prohibited employers from discharging employees on grounds of union membership). *See* Coppage v. Kansas, 236 U.S. 1, 11–13 (1915) (invalidating state statute that made it unlawful for employers to require non-membership in union as condition of employment). *See generally* U.S. CONST., Art. I. § 10, cl. 1 (prohibiting "Law(s) impairing the Obligation of Contracts").

This *Lochner*-era conclusion that government regulation of the employment relationship violated the parties' freedom of contract was overruled during the New Deal. In upholding the constitutionality of the National Labor Relations Act (NLRA), the Court recognized Congress' lawful and proper role in safeguarding employees' ability to obtain decent working conditions when bargaining with their employers.[163] Since the 1930s, Congress and state legislatures have overridden the at-will presumption on innumerable occasions—assuring employees the right to nondiscriminatory treatment[164] and establishing that employees may not be retaliated against for engaging in protected conduct or for blowing the whistle on employer misconduct.[165]

Decades of statutory changes, however, have not supplanted the vital albeit interstitial role of employment-at-will. Although legislation now prohibits employers from relying on a range of *specific* bad-faith motives when firing their workers, employers remain otherwise free to terminate employees at their discretion. Indeed, the mosaic of particularized legislative responses may subtly reinforce common law reluctance to alter the general background. Importantly, employers do *not* face any statutory obligation to justify discharges by giving reasons based on their employees' conduct or job performance, their own business circumstances, or their good faith belief regarding such performance or circumstances. Assuming they have not contracted away their freedom to terminate, employers may do so for arbitrary, manipulative, or malicious reasons as long as those reasons have not been forbidden under federal or state statutes.

The persistence of employment-at-will as a default is, of course, not inadvertent. Although few judges say so explicitly, at least one court has emphasized the importance of remaining free from an affirmative good faith requirement that would constrain employer prerogatives, noting that such freedom helps to attract and retain businesses and hence jobs.[166] Recent empirical studies furnish some support for this position. One study found

163. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33–34 (1937). *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–93 (1937) (sustaining legislative power to impose basic protection for workers under state minimum wage law).

164. *See, e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e to e-17 (2006); Equal Pay Act of 1963, 29 U.S.C. §206(d) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34; Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–13 (2008).

165. *See, e.g.*, National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3); Occupational Safety and Health Act § 11(c)(1), 29 U.S.C. § 660(c)(1); Michigan Whistleblowers Protection Act, MICH. COMP. LAWS §§ 15.361–15.369 (West 2004); Texas Whistleblower Act, TEX. GOV'T CODE ANN., § 554.002 (Vernon 2004).

166. *See* Whittaker v. Care-More, 621 S.W.2d 395, 397 (Tenn. 1981) (declining to adopt either a good faith or public policy exception, observing that Tennessee has attracted many new industries in recent years, enhancing per capita income, and "the impact on the continuation of such influx of new businesses should be carefully considered before any substantial modification is made in the employee-at-will rule.").

that a state's adoption of the good faith exception correlated with significant increases in the temporary help industry in that state.[167] Another study concluded that a state's approval of the good faith exception reduced the entry of new establishments.[168] The possible costs associated with a systemic modification of the at-will rule presumably help explain why the covenant has not been embraced to nearly the same degree as more selectively applicable exceptions based on an employer's handbook or a state's pre-existing public policy.[169]

In addition to its robust persistence in formal default terms, the at-will doctrine has had a significant informal impact on the development of federal laws regulating the workplace. In various distinct settings, courts have invoked or adverted to at-will norms when restricting employee rights and protections created by Congress. Examples from three significant statutes illustrate this point.

B. At-Will's Constraining Impact on Federal Statutes

1. National Labor Relations Act

The NLRA may be justly regarded as the first major federal wrongful discharge statute. As part of protecting employees who engage in organizing or collective bargaining activity, the law prohibits employers from "discrimination in regard to hire or tenure of employment [undertaken] to encourage or discourage [union] membership."[170] Yet the Supreme Court has made clear that an employer may lawfully close down its operations, discharging all its employees and retaining its assets for future investment, based on overt and highly visible anti-union animus.[171] Despite the NLRA's plain language prohibiting such improperly motivated tenure-of-employment decisions, the Court found compelling the underlying proposition that a businessman may "choose to go out of business if he wants to."[172] This proposition—a corollary of the presumption that employers retain unilateral control over their workforce—trumped the Act's explicit protections.[173]

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167. *See* Thomas J. Miles, *Common Law Exceptions to Employment at Will and U.S. Labor Markets*, 16 J. L. ECON & ORG. 74, 93–94, 98 (2000).

168. *See* David H. Autor, William R. Kerr & Adriana D. Kugler, *Does Employment Protection Reduce Productivity?: Evidence from US States*, 117 ECON J. F189, F190 (2007). For discussion of these and other related studies, see Bird, *supra* note 130, at 424–27.

169. *See supra* notes 13–14, and accompanying text (noting that forty-one states have adopted employer handbook exception and all fifty states have adopted some version of public policy exception).

170. 29 U.S.C. § 158(a)(3).

171. Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).

172. *Id.* at 270.

173. *See* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 79 (2000). *See also* First National Maintenance Corp. v.

Similarly, the NLRA recognizes employees' right to strike as part of their right to engage in concerted activity.[174] But even though employees may not be discharged for engaging in this protected right, the Supreme Court has held that an employer may permanently replace striking employees as part of his "right to protect and continue his business."[175] Like the right to discontinue his business, an employer's implied right to operate as he sees fit by hiring permanent replacements is linked to the presumption of employer control over the workforce. That presumption effectively reduces employees to little more than disposable assets in the strike setting.[176]

2. Title VII

Title VII of the 1964 Civil Rights Act is the most important employee protection statute enacted in the past half-century. The law prohibits employers from discharging or refusing to hire individuals because of their race, color, religion, sex, or national origin.[177] As is true under the NLRA, however, judicial application of Title VII protections has been constrained by at-will's continuing influence. That influence is made clear in Supreme Court decisions allocating the burden of proof.

Under Title VII, a discharged employee alleging discriminatory treatment makes out a prima facie case by showing that she was in the statute's protected class, that she was terminated, and that she was replaced by someone outside that class, typically a white male.[178] The employer then bears a burden of production—not persuasion—to offer a nondiscriminatory explanation for its discharge decision, meaning an explanation unrelated to one of the prohibited traits.[179] The discharged employee has a chance to refute this explanation by showing it is pretextual, but if she succeeds and does nothing more, she may well still lose as a matter of law. The Court has determined that in order to prevail she must prove that the employer acted from a prohibited discriminatory motive, not

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NLRB, 452 U.S. 666, 677–79 (1981) (holding that employer was not obligated to bargain in good faith about a decision to close a portion of its business, because management's interests in profitability and efficiency were "akin to the decision whether to be in business at all," and those interests trumped any conceivable union interest in protecting the job security of its members).

174. *See* 29 U.S.C. § 157, 163.

175. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938).

176. *See* Summers, *supra* note 173, at 80–81; James J. Brudney, *To Strike or Not to Strike,* 1999 WIS. L. REV. 65, 69–72, 77–81 (1999).

177. *See* 42 U.S.C. § 2000e-2(a).

178. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). *See generally* Texas Dept. of Cmty Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

179. *See Hicks*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254.

simply that the employer's articulated motive was false.[180] The presence of the at-will background norm means that an employer need not establish he acted reasonably or even honestly in his discharge decision.[181]

Discriminatory discharge cases under Title VII also may involve an employer acting from multiple motivations, only one of which is prohibited by the statute. In these "mixed motive" cases, assuming the employee proves that her discharge was partially motivated by her sex or race, the employer may still avoid the remedies of reinstatement and back pay by showing he would have made the same decision anyway for nondiscriminatory reasons.[182] Once again, an employer's "nondiscriminatory" reasons that are sufficient to support discharge may be arbitrary, unjustified, dishonest, or just plain silly.[183] In explaining its conclusion that allows employers to escape liability for reinstatement even when acting in part from unlawful motivation, the Court pointed to its view of the statute as "preserv[ing] . . . an employer's remaining freedom of choice," a thinly veiled reference to employment-at-will.[184]

In addition to affecting the contours of employee protections under Title VII, the at-will rule also contributes to divisive tensions between employees who are covered by the statute and employees who are not. As perceptively explained by Cynthia Estlund, the presence of Title VII means that employers are likely to be sensitive, or at least cautious, when considering disciplinary and discharge decisions involving female or minority employees. In this respect, even the qualified rights and remedies available under Title VII are preferable to the "unalloyed and merciless at-will regime" experienced by white male employees.[185] It is therefore to be expected that "[e]mployees who are not 'protected' . . . may perceive fairness itself as a special privilege from which they are excluded."[186] Estlund describes claims of "reverse discrimination" by this excluded

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180. *See Hicks*, 509 U.S. at 511, 514–15. *See generally* William R. Corbett, *The "Fall" of* Summers, *the "Rise" of "Pretext-Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 343–45 (1996); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670–71 (1996).

181. *See* Estlund, *supra* note 180, at 1671.

182. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989). Congress partially overrode *Price Waterhouse* in the 1991 Civil Rights Act, so that employees establishing partial discrimination are now prevailing parties with a right to declaratory relief and attorney's fees even if not to reinstatement or back pay. *See* Pub. L. No. 102-166, § 107, codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g). This modification is unique to Title VII: employers establishing a "same decision anyway" defense prevail in full for mixed motive discharges under the NLRA and the First Amendment. *See* NLRB v. Transportation Management Corp., 462 U.S. 393, 399–401 (1983) (NLRA); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 285–87 (1977) (First Amendment).

183. *See generally*, Corbett, *supra* note 180, at 337–39; Estlund, *supra* note 180, at 1672.

184. *Price Waterhouse*, 490 U.S. at 242.

185. Estlund, *supra* note 180, at 1681.

186. *Id.*

majority as "a tempting response that mirrors the victim-orientation of wrongful discharge law and aggravates the dynamic of fragmentation and polarization."[187]

3. Worker Adjustment and Retraining Notification Act

The final statutory illustration of at-will's enduring influence is the more recently enacted Worker Adjustment and Retraining Notification Act (WARN).[188] As the law's acronym suggests, WARN did not challenge business's right to close plants or offices and terminate large numbers of employees. The law instead sought to make companies accountable to employees and local communities, through advance notice combined with access to government-operated adjustment and training programs designed to assist dislocated workers.[189] Notwithstanding its modest goals, WARN experienced perhaps the most controversial rite of passage for any federal legislation enacted during the 1980s.

A major and unsuccessful advance notice bill targeted at plant closings had been introduced in the early 1970s.[190] It called for up to two years' notice and provided for displaced workers to receive severance pay, relocation allowances, and retraining benefits.[191] In 1985, a more cautious bill in the House had proposed ninety days' advance notice along with employer consultation (*not* bargaining) with the union or employees on ways to minimize anticipated job losses, but no severance payments or relocation benefits.[192] This bill was voted down on the House floor despite the presence of a Democratic majority.[193]

The WARN Act, introduced in January 1987 and enacted in July 1988, requires sixty days' advance notice before a plant closing or mass layoff.[194] There are no provisions for severance pay or employer consultation. There are, however, a number of exclusions—notably for layoffs affecting fewer

187. *Id.*

188. 29 U.S.C. §§ 2101–2109 (effective 1989).

189. *See* 29 U.S.C. § 2102(a)(2) (mandating notice to "the entity designated by the State to carry out rapid response activities"). The advance notice provisions were introduced in 1987 as part of a larger bill addressing the training and adjustment needs of dislocated workers. *See* S. Rep. No.100-62, at 3–14 (1987).

190. *See* H.R. 13541, 93d Cong. (1974) (National Employment Priorities Act); S. 2809, 93d Cong. (1973) (National Employment Priorities Act). Additional bills requiring advance notice were introduced regularly until the early 1980s. *See, e.g.*, National Community Notification Act, H.R. 5829, 98th Cong. (1984).

191. *See* H.R. 13541, §§ 2301, 2401–03, 2411–12, 93d Cong. (1974) (requiring two years' advance notice and providing for income maintenance benefits, job retraining benefits, and relocation allowances); S. 2809, 93d Cong. (1973) (same section numbers, same requirements and provisions). *See also* H.R. 5829, § 3, 98th Cong. (1984) (requiring one year advance notice).

192. *See* H.R. 1616, 99th Cong. (1985).

193. *See* 131 Cong. Rec. 32,939 (1985) (Roll No. 421, 208-203).

194. *See* 29 U.S.C. § 2102(a).

than fifty employees or (for larger enterprises) affecting less than one-third of the workforce—and also several exceptions, most importantly for business circumstances not reasonably foreseeable at the time notice would have been required.[195] WARN's tempered set of constraints on employers' ability to displace large numbers of employees were enacted only after eighteen months of intense and divisive political dialogue.[196] President Reagan vetoed the bill and the Senate failed to override by a four-vote margin.[197] When Congress passed the bill a second time, Reagan allowed it to become law without his signature—the only such occurrence during his eight-year presidency.[198]

Resistance from the employer community[199] and its leading supporters[200] could hardly have been more fierce. Even when *Business Week* reported that 86% of the public favored having the federal government require sixty days' advance notice,[201] American business remained adamant in opposition. The breadth and intensity of this opposition is best understood by reference to employment-at-will. WARN

195. *See* 29 U.S.C. § 2101(a)(3) (defining mass layoff); *id.* at § 2102(b)(2)(A) (describing reasonably foreseeable business circumstances exception).

196. *See Senate Defies Veto Threat on Trade Bill*, WASH. POST, July 10, 1987, at B1; Stuart Auerbach, *Conferees, Defying Veto Threat, Back Notice on Plant Layoffs*, WASH. POST, Mar. 30, 1988, at F1; Stuart Auerbach, *Senate Democrats Defeat Effort to Weaken Plant-Closing Bill*, WASH. POST, June 28, 1988, at E1; Tom Kenworthy, *Democrats See Plant-Closing Notice as Campaign Issue*, WASH. POST, July 14, 1988, at A6; Steven V. Roberts, *Reagan is Pressed On Plant Closings*, N.Y. TIMES, July 26, 1988, at A1.

197. *See* 134 CONG. REC. 13529 (1988) (reprinting President Reagan's veto message, dated May 24, 1988); *id.* at H3552 (House overrides veto by 308–113); *id.* at S7385 (daily ed. June 8, 1988) (Senate sustains veto by 61–37).

198. *See* Steven V. Roberts, *President Decides Not to Veto Bill Requiring Notice of Plant Closings*, N.Y. TIMES, Aug. 2, 1988, at A1; 24 WEEKLY COMP. PRES. DOCS. 990 (1988) (President's Statement on the Worker Adjustment and Retraining Notification Act). Under Art. I. § 7 of the U. S. Constitution, a bill becomes law after being passed by both chambers of Congress and presented to the President if he fails to sign or veto the bill within ten days.

199. *See, e.g., Economic Dislocation and Worker Adjustment Assistance Act, H.R.1122: Hearing Before the Subcommittees on Labor-Management Relations and Economic Opportunities of the H. Comm. on Education and Labor*, 100th Cong. 80 (1987) (statement of J. Bruce Johnston on behalf of Nat'l Ass'n of Manufacturers (NAM), criticizing plant closing proposal as "punitive . . . divisive and unconstructive"); *id.* at 99 (letter from John Irving, NAM Special Counsel, asserting that proposal would "jeopardize any competitive edge American businesses currently enjoy"); *Economic Dislocation and Worker Adjustment Assistance Act: Joint Hearings Before the Subcommittee on Labor and the Subcommittee on Employment and Productivity of the S. Comm. on Labor and Human Resources*, 100th Cong. 146 (1987) [hereinafter Senate Hearings] (statement of Frank P. Doyle on behalf of the Committee for Economic Development, asserting the advance notice requirements will "decrease the flexibility and competitiveness of U.S. companies, especially . . . smaller firms"); *id.* at 166 (statement of Allan R. Thieme on behalf of U.S. Chamber of Commerce, criticizing proposed requirements as "restrictive, inflexible, expensive and counterproductive to the goals of preserving jobs and assuring profitability").

200. *See, e.g.*, Senate Hearings, *supra* note 199, at 10 (statement of Sen. Gordon Humphrey, describing proposal as "a Marxist economist's dream"); 134 CONG. REC. 16118 (1988) statement of Sen. Philip Gramm, asserting that "this bill represents the worst of America"); *The Job-Destruction Bill*, Editorial, WALL STREET JOURNAL, Mar. 26, 1987.

201. BUSINESS WEEK, July 20, 1987, at 71 (reporting results from Business Week/Harris Poll).

is far less protective than European laws that preceded it and that have been maintained or strengthened since 1988.[202] But American employers could not countenance even a modest incursion on their untrammeled entrepreneurial powers to lay off or discharge employees as they deemed appropriate.

After twenty years of implementation, WARN's exclusions and exceptions—necessary to secure congressional passage in 1988—have turned out to diminish the scope and effectiveness of the sixty-day notice requirement.[203] In addition, federal courts have been less than enthusiastic when enforcing the statute. Although WARN's remedial and protective purposes are clear, courts have expansively construed key provisions excluding layoffs under a certain size[204] and excusing lack of notice based on unforeseeable business circumstances.[205] Once again, the at-will default rule seems to play a meaningful if subtle role. Individual employees unsuccessfully asserting their right to sixty days' notice (or a backpay remedy) are not much worse off in practical terms than employees who are simply laid off or discharged. Working from a paradigm that confers unlimited managerial power over job tenure decisions, federal courts may tend to regard employees as having little to lose when they assert a statutory right that is ultimately derivative of their soft stake in job security.

It is important not to overstate the impact of the at-will rule on federal employee protection statutes. Courts deciding job-loss related cases under the NLRA, Title VII, and WARN rely on statute-specific justifications that may be persuasive in doctrinal terms. For each statute, however, the background norm of an at-will workplace helps to explain resolutions that decline to credit or sufficiently value employee job security interests in contested settings. Given at-will's substantial influence in curtailing

202. *See* JOHN BOWERS, A PRACTICAL APPROACH TO EMPLOYMENT LAW, 439–82 (7th ed. 2005) (discussing European consultation and notice requirements under 1975 EC Directive on Collective Redundancies and successor directives, and also European job security protections under 1977 EC Directive on Acquired Rights and successor directives). European countries have implemented these substantial employee protection requirements through domestic legislation and court decisions. *See, e.g.*, Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/74); Litster v. Forth Dry Dock & Eng'g Co. Ltd., [1989] 1 All E.R. 1134 (HL 1989).

203. *See* Testimony of Richard Trumka, Secretary-treasurer, AFL-CIO, at Senate Health Education Labor Pensions Committee Hearing (May 20, 2008); GAO, THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (Sept. 2003); GAO, DISLOCATED WORKERS: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT NOT MEETING ITS GOALS (Feb. 23, 1993). There are recent proposals to strengthen the law so that more employees losing their jobs are able to receive adequate notice. *See* S.1374, 111th Cong. (2009); H.R. 3042, 111th Cong. (2009).

204. *See, e.g.*, Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277 (8th Cir. 1996); Guinn v. Timco Aviation Services Inc., 317 F.Supp.2d 888 (W.D. Ark. 2004).

205. *See, e.g.*, Watson v. Michigan Industrial Holdings, Inc., 311 F.3d 760 (6th Cir. 2002); Burnsides v. MJ Optical, Inc., 128 F.3d 700 (8th Cir. 1997); Loehrer v. McDonnell Douglas Corp., 98 F.3d 1056 (8th Cir. 1996).

explicit legislative obligations imposed on employers, its impact on implied common law duties is hardly surprising.

IV. CONCLUSION

In Britain and other European countries, employees have a statutory right not to be unfairly dismissed, and the employer bears a burden to demonstrate valid work-related reasons for any dismissal.[206] In contrast, Congress and state legislatures have been unwilling to impose on employers an affirmative obligation to justify employee discharges.[207] The one systemic exception in the United States involves employees covered by collectively bargained agreements.

These negotiated agreements routinely specify, as part of a Discipline Article, that employees may only be dismissed for "just cause" established by the employer.[208] Just cause typically includes both substantive and procedural components. Substantively, employers must show an unacceptable level of employee performance, by reference to inadequate attendance, disobedience of reasonable work rules, failure to produce a reasonable quantity and quality of work, or conduct that interferes with the employer's ability to carry on its business.[209] Procedurally, an employer typically may not discharge employees who fail to meet substantive standards unless she provides adequate notice and an opportunity to be heard, applies progressive discipline, and adheres to some form of equal treatment.[210]

When job security is protected by just cause as a core element of collective bargaining agreements, the covenant's status becomes more firmly embedded. The covenant assures that parties to a collectively negotiated contract receive the fruits of that contract, including presumptive

206. *See, e.g.*, Employment Rights Act 1996, c. 18, §§ 94–98 (Eng.); Kündigungsschutzgesetz [KSchG] [Dismissal Protection Act], Aug. 25, 1969 Bundesgesetzblatt [BGB] at § 1 (Ger.); CODE DU TRAVAIL art. L 122-14, L 321-I (Fr.).

207. *See supra* note 88 (discussing Montana as the only state that has enacted a law prohibiting termination without good cause).

208. *See, e.g.*, ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW CASES AND MATERIALS, 2009 STATUTORY APPENDIX AND CASE SUPPLEMENT 113–14 (14th ed. 2009) (setting forth Discipline Article of an illustrative collective bargaining agreement).

209. *See, e.g., id.* at 113 (listing as causes for immediate discharge *inter alia* failure to report for duty without bona fide reasons, refusal to comply with conspicuously posted company rules, bringing narcotics or intoxicants into the workplace, disorderly conduct, and deliberate destruction or removal of company property).

210. *See, e.g., id.* at 113–14 (discussing requirements of notice accompanied by statement of reasons, and use of progressive discipline); *id.* at 114–15 (setting forth multi-step grievance procedure culminating in arbitration).

job stability.[211] Arbitrators regularly apply the covenant in job security-related contexts, to assure that the just cause standard is properly adhered to[212] but also to address subcontracting disputes[213] and to help define and limit application of the management rights clause.[214] One arbitrator referred to the covenant as "form[ing] the heart of any successful collective bargaining relationship."[215]

Collective bargaining agreements, however, apply to less than 8% of the private sector workforce.[216] The bottom line is that the covenant's scope and vibrancy are circumscribed in the absence of a broad-based foundation for job security. A handful of state courts have protected compensation-related benefits of the bargain against opportunistic employer misconduct. Even fewer have applied the covenant directly to the job security term of an agreement, and they rely on the employer's deceitful manipulation of that term rather than on a general theory of bad faith or malicious termination.[217]

Courts reviewing disputes at the hiring stage are prepared to impose upon knowledgeable and powerful employers an affirmative duty to provide truthful or at least non-distortive information to vulnerable employees regarding their prospective employment.[218] But once these unequally endowed employers and employees have formed a contract, the great

211. *See generally* ELKOURI & ELKOURI, *supra* note 7, at 478–79 (noting that majority of arbitral decisions addressing the covenant involve employee discharges).

212. *See, e.g.*, Sierra Chemical Co., 121 Lab. Arb. 1593, 1595 (2006) (Pool, Arb.) (holding that employer's failure to conduct thorough investigation before discharging employee violated the covenant).

213. *See, e.g.*, Libbey Glass, 116 Lab. Arb. 182, 186–87 (2000) (Ruben, Arb.) (observing that covenant requires management to demonstrate its subcontracting decision was made in good faith and was objectively reasonable; union is not required to prove "bad faith" on the part of management); United Technologies Automotive, 108 Lab. Arb. 769, 772 (1997) (Richard, Arb.) (holding that management's exercise of its residual right to subcontract is limited by the covenant implied in all labor agreements, and that to meet their burden of proof under the covenant, employers must establish at least a good faith belief in the sound economic reasoning for subcontracting work previously carried out by bargaining unit members, and perhaps even conclusive proof that special economic needs exist).

214. *See, e.g.*, Miami Beach Fraternal Order of Police, 1997 WL910355 at *8 (1997) (Kravit, Arb.) (relying on covenant to hold that in exercising its right to transfer employees on operational grounds, management discretion must be applied reasonably and may be reviewed to determine if it has been applied in an arbitrary, discriminatory, or capricious manner); Ashland Oil, 95 LA 339, 344-45 (1990) (Volz, Arb.) (holding that under covenant, management in the exercise of its reserved authority must "do what is reasonably contractually required, even though a cheaper method might be found by disregarding the fruits of the bargain which the parties accorded to the adversely affected employees").

215. Indianapolis Pub. Transp. Corp., 94 Lab. Arb. 1299, 1303 (1990) (Volz, Arb.).

216. Private sector union membership fell to 7.2% in 2009 and 6.9% in 2010, as the recession hit unionized jobs especially hard. *See* Larry Swisher, *Unions Lost 771,000 Members in 2009, as Recession Eliminated Jobs, BLS Says,* DAILY LAB. REP. (BNA), Jan. 25, 2010, at AA-1; Larry Swisher, *Union Membership Dropped in 2010 as Key Industries Shed Jobs, BLS Says*, DAILY LAB. REP. (BNA), Jan. 21, 2011, at AA-1. Unions represented 7.7% of all employed private sector workers in 2010. *See id.* at E-3.

217. *See* Delaware Supreme Court in Merrill v. Crothall-Am., Inc., 606 A.2d 96 (Del. 1992) and E.I. DuPont De Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996); Montana Supreme Court in Crenshaw v. Bozeman Deaconess Hospital, 693 P.2d 487, 490, 492 (Mont. 1984).

218. *See* authorities and cases discussed at *supra* notes 139–152 and accompanying text.

majority of jurisdictions regard it as unjustified and unwise to insist on a similar affirmative duty of honest dealing. Judicial reluctance is primarily attributable to the perceived tension between a recently promoted employer obligation to act honestly and fairly when terminating employees and an entrenched employer right to terminate without any such limitations. It is not readily apparent why courts might abandon their reluctance in the near future.